Supreme Court, U.S.
FILED
NOV 8 2002
OFFICE OF THE CLERK

No. 02-281

In the Supreme Court of the United States

INYO COUNTY, A PUBLIC ENTITY; PHIL MCDOWELL, INDIVIDUALLY AND AS DISTRICT ATTORNEY; DAN LUCAS, INDIVIDUALLY AND AS SHERIFF,
Petitioners,

v.

PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY OF THE BISHOP COLONY; AND BISHOP PAIUTE GAMING CORPORATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the doctrine of tribal sovereign immunity enables Indian tribes, their gambling casinos and other commercial businesses to prohibit the searching of their property by law enforcement officers for criminal evidence pertaining to the commission of off-reservation State crimes, when the search is pursuant to a search warrant issued upon probable cause.

2. Whether such a search by State law enforcement officers constitutes a violation of the tribe's civil rights that is actionable under 42 U.S.C. § 1983.

3. Whether, if such a search is actionable under 42 U.S.C. § 1983, the State law enforcement officers who conducted the search pursuant to the warrant are nonetheless entitled to the defense of qualified immunity.

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REPLY OF PETITIONERS

Respondents Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, and the Bishop Paiute Gaming Corporation (collectively referred to as the "Paiute-Shoshone"), clearly do not want the Supreme Court to address the primary issue in this case. That issue, of course, is whether the doctrine of tribal sovereign immunity enables Indian tribes to prohibit the searching of their gaming casinos, resorts, and other businesses and property for criminal evidence pertaining to the commission of off-reservation State crimes, when the search is made by law enforcement officers pursuant to a search warrant issued upon probable cause.

Paiute-Shoshone argue that such a ruling is not necessary because the ruling of the Ninth Circuit in this case – that the doctrine of tribal sovereign immunity does indeed enable Indian tribes to prohibit such searches – is simply a "routine application of this Court's precedents." (Brief in Opposition to Petition for Writ of Certiorari, page 7.)

Petitioners, on the other hand, along with the 12 *Amici Curiae* States of California, Connecticut, Florida, Alabama, Texas, Kansas, Missouri, Nebraska, South Dakota, Nevada, Utah, and Oregon – States from six different Federal Circuits,[1] argue "not so," and show that the ruling of the Ninth Circuit is not an application of Supreme Court precedents at all.

Petitioners and the *Amici* States instead show that tribal sovereign immunity has never, ever, before been found or intimated by the Supreme Court to enable Indian tribes to prohibit the searching of their property by law enforcement

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[1] Brief of *Amici Curiae* States of California, Alabama, Connecticut, Florida, et al., filed herein.

officers for criminal evidence of off-reservation State crimes. They argue that the Court should not extend tribal sovereign immunity to so enable tribes to prohibit such searches, and urge that a writ of certiorari issue, and the decision of the Ninth Circuit thereupon be reviewed and reversed.

That these States, from East Coast to West Coast, have spoken to this matter is evidence of its importance to the enforcement of State criminal laws, and its importance will only increase as the tribes and their casinos, resorts, and other businesses continue to expand.

These positions, and additional arguments in support of them, are also presented herein by the *Amici Curiae* brief of the National Sheriffs' Association, which advocates for 3,088 Sheriffs located throughout the United States; and by the Western States Sheriffs' Association (which includes the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Texas, Utah and Washington); and also by the separate joinder in that brief of the statewide Sheriffs and Police Associations of a total of 34 of the 50 United States – representing States from all 11 of the Federal Circuits covering the individual States – including the East Coast States of New Hampshire, Vermont, Massachusetts, New York, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, Georgia and Florida; across the South and including the States of Alabama, Arkansas, and Louisiana; from Kentucky, Indiana and Illinois, across the Mid-West including Iowa, Minnesota, Nebraska, Kansas and Missouri; into the Southwest and the States of Oklahoma, Texas, New Mexico and Arizona; and throughout the west from the State of California northward to Oregon and to Washington; and from Idaho and Montana southward to Colorado and Utah.

In total, the law enforcement communities of more than *two-thirds of the States* have presented positions urging this Court to grant certiorari and review this important case.

Additionally, the *Amicus Curiae* brief of the California State Sheriffs' Association, representing all 58 of the elected Sheriffs of California; as well as the *Amicus Curiae* brief of the County of Los Angeles, as joined by the California District Attorneys Association representing all 58 elected District Attorneys of California, and as joined by the California State Association of Counties representing all of the 58 California Counties themselves, present strong additional arguments, and further show that the Ninth Circuit's ruling is not simply a "routine application of this Court's precedents."

There is nothing "routine" about the decision of the Ninth Circuit in this case. If allowed to stand, Indian resorts, hotels, casinos, and other tribal properties throughout the United States will serve as enclaves for the sanctuary of criminal evidence and criminals, immune from search, seizure and arrest, until, and if and only if, the Indian tribe upon whose property the evidence or criminals reside decides to allow law enforcement officials access.

One can only imagine the effect of such a state of affairs. For instance, what if the Washington D.C. area sniper suspects had taken refuge in a tribal hotel or casino?[2] What if a serial murderer, rapist, money launderer, drug dealer, or other perpetrator of State crime seeks refuge for

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[2] According to the San Diego Union-Tribune, October 3, 2002, page 1, the Viejas Indian Band of San Diego County, California, along with 3 other tribes, are in the process of building a $43,000,000.00 Marriott Residence Inn in Washington, D.C., only a few blocks from the Capital.

himself or the bounty or evidence of his crime in tribal hotels, resorts or casinos? Search and arrest warrants will be meaningless and useless in the search for the suspects, and in searching for the bounty, evidence and instrumentalities of the crimes – subject only to the ultimate decision of tribal governments. What if tribal government allowed access, but conditioned access (that is, regulated the performance of law enforcement officers in performing law enforcement duties) only upon certain conditions – such as allowing only an unsafe and tribal-dictated limited number or type of law enforcement officers onto the hotel or casino property, and only at specified times, with only specified weapons, so as not to disturb guests, as the tribe deemed appropriate? Might the suspects slip away during "negotiations" between tribal personnel and law enforcement officials, and the killing and other crime then continue? What if the appropriate tribal personnel are not available to give consent to the search? What if there is intra-tribal dispute as to who has authority to give consent to the search? The effect on the States' ability to investigate and prosecute violations of off-reservation State crime would be enormous.

As presented by the petition for writ of certiorari, and by all of the *Amici* briefs filed herein, the Ninth Circuit's attempt in this case to expand the doctrine of tribal sovereign immunity to enable Indian tribes to prohibit the searching of their property by law enforcement officers for criminal evidence pertaining to the commission of off-reservation State crimes, pursuant to a search warrant issued upon probable cause, constitutes a never before found tribal "right." It represents a serious extension of federalism. and a severe limitation and infringement upon States' sovereignty.

If such a right exists, then it should, respectfully, be left to this Court to declare it, to find it constitutional, and to find that such a right is in keeping with the principles of

federalism and States' sovereignty upon which the nation and the Constitution were founded and formed.

Accordingly, the petitioners, the *Amici* States by and through their respective State Attorneys General, and all other *Amici*, respectfully urge that the petition for writ of certiorari be granted to address this important issue of federal law and States' sovereignty, an issue which should be settled by this Court.

I. THE INDIAN GAMING REGULATORY ACT AND TRIBAL-STATE GAMING COMPACT ARE NOT RELEVANT TO THIS CASE

Paiute-Shoshone go to some length to apprise the Court that the Paiute Palace Casino is operated under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701, et seq. ("IGRA"), and also pursuant to a Tribal-State Gaming Compact ("Compact") negotiated with the State of California pursuant to the IGRA. However, neither the IGRA nor the Compact have anything to do with the investigation of off-reservation State crimes (nor to non-gaming on-reservation State crimes, for that matter).

The District Court correctly found that the IGRA is limited by its own terms to gaming regulation, that the criminal investigation and execution of the search warrant herein did not involve gaming regulation, and that the investigation and search warrant instead involved a non-gaming State law felony. (Pet. 63a). The Ninth Circuit agreed with the District Court, and held, as did the District Court, that the IGRA was not applicable to this case or to the arguments being advanced by Paiute-Shoshone. (Pet. 26a).

Further, any inference that the negotiated Compact somehow mitigated the right of the State to investigate off-reservation State crime is without any support. Nothing in the Compact limits or purports to limit the criminal jurisdiction of the State with respect to off-reservation State crime. (ER 142-200).

II. PUBLIC LAW 280 DOES NOT APPLY TO THIS CASE

Paiute-Shoshone also discuss at length several cases involving Public Law 280. However, not a single Public Law 280 case cited by Paiute-Shoshone, or the Ninth Circuit, involves or addresses the rights of States to investigate off-reservation State crimes. The reason for this is simple: Public Law 280 does *not* have any effect or applicability to the rights of the States to investigate and prosecute off-reservation State crime. The Supreme Court has already observed and acknowledged this in *Nevada v. Hicks*, 533 U.S. 353, 365-366 (2001) (Public Law 280 applies only to crimes committed *"in Indian Country"* – italics by Court).

As is well-stated in the Brief of *Amici Curiae* States of California, Alabama, Connecticut, Florida, et al.:

> " ... The decision below [by the Ninth Circuit] turned Public Law 280 on its head and trumped this Court's *Hicks* analysis by limiting state jurisdiction to investigate *off-reservation* crimes. Yet Public Law 280, which extends state jurisdiction to *on-reservation* crimes, has no relevance whatsoever to crimes occurring off-reservation and so is not a basis for *limiting* the scope of state authority. In fact, states have "inherent" jurisdiction to execute search warrants, or any other form of process, within Indian country. *Nevada v. Hicks*, 533

> U.S. at 366. No provision of federal law preempts the State of California's authority to do so."
>
> * * * * *
>
> "... The Ninth Circuit's analysis is distorted by the faulty premise that Public Law 280 governs the exercise of all state law-enforcement activity within Indian country--even that which relates to the commission of an off-reservation crime. Through this clouded lens, the court of appeals analyzed the lawfulness of the county's execution of the search warrant in terms of Congress' intent to abrogate tribal sovereign immunity under Public Law 280. <u>But Public Law 280 has nothing to do with state law enforcement activity related to the commission of an off-reservation crime</u>... Accordingly, this case has nothing whatsoever to do with attributes of tribal sovereignty Congress may have intended to preserve under Public Law 280 as a matter of statutory interpretation. <u>Rather, this case concerns whether, and to what extent, state sovereignty is diminished by tribal sovereignty as a matter of constitutional law</u>."
>
> Brief of *Amici Curiae* States of California, Alabama, Connecticut, Florida, et al., pages 5-8. (Italics in original text; underscoring emphasis added.)

Accordingly, the entire discussion by Paiute-Shoshone, as well as by the Ninth Circuit, regarding Public Law 280 is inapplicable to this case.

III. PAIUTE-SHOSHONE'S CLAIM THAT THE NINTH CIRCUIT OPINION BELOW IS CONSISTENT WITH THIS COURT'S DECISIONS IN *NEVADA V. HICKS* AND *MONTANA V. UNITED STATES* DEMONSTRATES A FUNDAMENTAL MISUNDERSTANDING OF THOSE DECISIONS

Paiute-Shoshone also assert that the Ninth Circuit's decision is actually consistent with both *Nevada v. Hicks*, 533 U.S. 363 (2001), and *Montana v. United States*, 450 U.S. 544 (1981). This assertion demonstrates a fundamental misunderstanding of those decisions.

The argument advanced by Paiute-Shoshone is that while *Nevada v. Hicks* and *Montana v. United States* are acknowledged to limit tribal governmental authority over non-Indians, the Ninth Circuit's decision in this case does "not" involve any such tribal governmental authority over non-Indians (i.e., over law enforcement officers and the States), for such prohibition merely "concerns a tribe's control over its members and economic enterprise, which are internal affairs." Brief in Opposition, page 21.

What Paiute-Shoshone fail to grasp, of course, is that by prohibiting law enforcement officers from executing a search warrant issued upon probable cause, tribal government is not only "regulating" the performance of law enforcement duties by those officers (something which this Court in *Nevada v. Hicks* clearly stated that the tribe could not do, *supra*, page 373), it is actually *prohibiting* them from conducting those law enforcement duties.

For the Paiute-Shoshone to say that such conduct "only affects tribal members" is naïve. It totally disregards the interests of the State, and its off-reservation and on-reservation residents, in investigating and prosecuting off-reservation State crime. It also totally disregards the recent ruling of this Court that the State's interest in serving process – search warrants – on the reservation, with regard to the investigation of off-reservation violations of State criminal law, is considerable. *Nevada v. Hicks*, supra, 364.

Portions of the oral argument of the parties before this Court in *Nevada v. Hicks,* on March 21, 2001, are also instructional as to the fallacy of Paiute-Shoshone's contention that its prohibition of a search of its property is entirely "intra-tribal" and affects only its "internal relations." Those portions of the oral argument are set forth in Appendix A, and the points raised therein served as the heart of the *Nevada v. Hicks* decision.

IV. ALL ARGUMENTS ADDRESSING THE ISSUE OF WHETHER THE SEARCH OF TRIBAL PROPERTY BY LAW ENFORCEMENT OFFICERS IS ACTIONABLE UNDER 42 U.S.C. §1983 ARE PROPERLY BEFORE THE COURT

In its decision below, the Ninth Circuit raised and decided, *sua sponte,* the *issue* of whether the tribe may state a claim for violation of its civil rights arising from the alleged unlawful search of its property by law enforcement officers pursuant to the search warrant. (Pet. 6a and 42a).

Having done so, and contrary to the claim of Paiute-Shoshone (Brief in Opp., n.15, page 24), all *arguments* addressing that issue are properly before this Court, whether

or not they were a subject of petitioners' Petition for Rehearing *En Banc* at the Ninth Circuit. *Virginia Bankshares, Inc. v. Sandburg*, 501 U.S. 1083, 1099 n.8 (1991); *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995). Such arguments include whether or not a tribe has standing as a "person" under 42 U.S.C. §1983 to make a claim under the statute, and also include without limit the argument raised in the Petition for Rehearing *En Banc* that neither the tribal right to self governance, nor the claimed tribal right of sovereign immunity from search pursuant to search warrant, if it exists, is a constitutional or statutory right that will support a 42 U.S.C. §1983 action.

Additionally, even though standing as a "person" may not have been raised below, the Court is obliged to examine standing *sua sponte* where standing has erroneously been assumed below. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 95 (1998).

CONCLUSION

For the reasons set forth above, in the petition for writ of certiorari, and in the briefs of *Amici Curiae,* the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE UNITED STATES

No. 99-1994

Washington, D.C.
Wednesday, March 21, 2001

STATE OF NEVADA, ET AL.)
Petitioners)
)
v.)
)
FLOYD HICKS, ET AL.)
)

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

C. WAYNE HOWLE, ESQ., Carson City, Nevada; on behalf of Petitioners.

S. JAMES ANAYA, ESQ., Tucson, Arizona; on behalf of the Respondents.

BARBARA MCDOWELL, ESQ., Assistant to the Solicitor General, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting affirmance.

* * * *

Beginning at page 15, line 2:[1]

> QUESTION: I certainly wouldn't think that the state's ability to enforce criminal laws off the reservation is going to be dependent upon whether a tribal court will deign to issue a search warrant or not. I mean, that would be a tremendous incursion upon the state's sovereignty that it can't enforce its criminal laws unless it gets a tribal court to let it go on and search for the offense.
>
> MR. HOWLE: Exactly. And that's the position we have --
>
> QUESTION: I assume that to be pretty clear law.
>
> MR. HOWLE: Yes. Another point we've made is the way that this --
>
> QUESTION: Where did you take that position, because I didn't see the --
>
> MR. HOWLE: I'm sorry. It's on page eighteen of my reply brief, in the second paragraph. The argument also incorrectly

[1] Transcript of oral argument, In the Supreme Court of the United States, Wednesday, March 21, 2001; www.supremecourtus.gov/oral_arguments/argument_transcripts/99-1994.pdf

> assumes state officials are powerless to pursue state law enforcement objectives on a reservation, except with the tribe's consent. And here I've identified the fact that states do have authority over off-reservation crimes committed by tribal members, and that reservations are part of the state within which they occur.

* * * * *

Beginning at page 26, line 5:

> QUESTION: Well, the petitioner says they didn't even need to get tribal court permission to get a search warrant.
>
> MR. ANAYA: We disagree, and the authority of this Court will indicate the contrary.
>
> QUESTION: And what do you rely on?
>
> MR. ANAYA: Williams v. Lee, and its progeny, Your Honor, which establishes clearly that the sovereignty of tribes precludes the authority of the state to the extent it interferes with the ability of the tribe to make its own laws and be governed by them.
>
> QUESTION: But it's not governed by its own criminal laws insofar as a crime that occurs off the reservation is concerned. Could this tribal court have tried this crime?

MR. ANAYA: Your Honor, the tribal court – if this were a crime under tribal law, and it is not a crime under tribal law as far as I know.

QUESTION: The tribe can make off-reservation crimes a crime under tribal law triable in the tribal court?

MR. ANAYA: It could as to members, perhaps.

QUESTION: Oh, crimes by members.

MR. ANAYA: By members.

QUESTION: Not crimes against members.

MR. ANAYA: Yes, Your Honor.

QUESTION: And what if they did make it triable in tribal court -- would the state still be able to prosecute it as a violation of state law?

MR. ANAYA: The state could, in any instance, prosecute this case. What is at issue here is whether it can go onto the reservation to execute a warrant.

QUESTION: Well, the state's ability to prosecute is not worth a whole lot if it leaves [needs] the by your leave of somebody else to go and grab the person who allegedly did the offense.

MR. ANAYA: That may be.

QUESTION: That's what you're saying -- that the state is entirely at the mercy of the tribal court to get a search warrant, and I presume an arrest warrant as well.

MR. ANAYA: Yes, Your Honor, that is what I'm saying.

QUESTION: That's quite an incursion on the state's criminal jurisdiction, it seems to me.

[Note by Petitioners: The points raised by the Court's questioning above served as the heart of the Court's opinion in *Nevada v. Hicks*, 533 U.S. 353 (2001), at pages 363-364.]